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IN THE

Supreme Court of the United States

OCTOBER TERM—1938

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP and DR. MAXIMILIAN GOLDSTEIN,

Petitioners,

—*against*—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Petitioners,

—*against*—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners Joseph J. Weiss, Martin Gross, Dr. George Krupp and Dr. Maximilian Goldstein respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on April 13, 1939, affirming a judgment of the District Court of the United States for the Southern District of New York, entered on March 7, 1938, convicting the petitioners of the crimes of using the mails to defraud, in violation of 28 U. S. C., Section 338; U. S. C. C., Section 215, and of conspiracy to commit an offense against the United States, to wit, to use the mails to defraud, in violation of 18 U. S. C., Section 88.

Statement of Matters Involved.

Petitioners, with others, were indicted on twenty counts, nineteen of which charged petitioners with using the mails pursuant to an alleged scheme to defraud life insurance companies by inducing them to pay false claims for disability, health and accident benefits under insurance policies. The twentieth count charged petitioners with conspiracy so to do. Petitioners Weiss, Goldstein and Gross were convicted on all counts except counts numbered "8" and "12". Petitioner Krupp was convicted on all counts except counts numbered "8", "9", "10", "11", "12" and "13".

The alleged conspiracy and scheme to defraud, charged in the indictment, covered a period from January 15, 1934 to and including the date of the filing of the indictment on July 30, 1937.

I.

The Government, in order to prove its case, introduced, over petitioners' objection and exception, evidence of seventy-five intrastate telephone communications which had been intercepted by means of "tapping" telephone wires (R. 2729-33). The contents of three other such intercepted intrastate communications were not placed in evidence, but were put before the jury in the form of questions of the prosecutor (R. 2000, 2003, 1965-9, 1908-25). Evidence as to one intercepted telephone communication was introduced without proof as to whether the communication was intrastate or interstate.

The work of intercepting and recording these communications had been carried out, in the City and State of New York, by a private detective agency—paid by insurance companies, which agency acted throughout under the direct supervision and control of agents of the United States (R.

586). The telephone wires thus "tapped" were those of the office of the petitioner Weiss, located in the City of New York, and that of the defendant Messman (who testified for the Government) also located in the City of New York. Every call coming to or going from the Weiss office was intercepted and recorded (R. 580) regardless of whether the call was intrastate or interstate (R. 1825-8).

Such "wire-tapping" is a criminal offense under the laws of the State of New York: New York, Consolidated Laws [Penal Law], Chapter 40, Section 1423 (6).[1]

The phonographic discs upon which these conversations were recorded by the intercepters were placed in evidence and many of them were played in open court upon a phonograph. In addition, stenographic transcripts of the conversations were admitted in evidence over objection and exception, and read to the jury.

This evidence, according to the statement of the United States Attorney in his summation, constituted the "crux" of the prosecution's case (R. 2575). The Court below recognized this to be the fact and recognized that the admission of this evidence prejudiced all of the petitioners.

The Court below stated (Opinion p. 7):

> "Such evidence weighed against Goldstein and his conviction ought not to stand if the communications implicating the others were improperly received."

The Court below also stated (Opinion p. 7):

> "The defendant Weiss is in the same position and his conviction can only stand if we are right in holding

1. The Court below erroneously stated in its opinion that "no law of New York prohibited obtaining messages by wiretapping" (Opinion p. 5). See *Olmstead* v. *U. S.*, 277 U. S. 438, 479.

that the communications derived through wire tapping were competent evidence. Weiss, who was a party to conversations obtained through thirty-four wire taps was prejudiced by their admission unless they were lawfully received in evidence."

The Court also held that the petitioners Gross and Krupp were legally prejudiced unless the intercepted communications were properly admitted (Opinion p. 7).

II.

The summation of the United States Attorney exceeded the latitude permitted by the applicable decisions of this Court. He told the jury that the exhibits in the case were only "a fraction" of those in his possession (R. 2573). He stated in substance that the grand jury which had returned this indictment had accepted the testimony of the same persons who appeared at the trial as Government witnesses (R. 2572-73). He discussed his personal opinion of the guilt of the defendants and told the jury that prior to the trial, in the preparation of the case, he had become convinced of their guilt (R. 2573). He appealed to the pecuniary interests of the jurors as policy holders in insurance companies by stating that when insurance companies paid disability claims "the dividends go down and your premiums go up" (R. 2576). He stated that if the jury convicted the defendants, there would be a "one thousand per cent. dividend to the policy holders of America" (R. 2580). He attempted to justify certain aspects of the evidence by informing the jury of private conversations which he had had out of court with his own assistants (R. 2577). He appealed to the jurors on the ground that "the Government looks to you for your assistance in the suppression of crime" (R. 2582-83).

The Court below, in its opinion, stated that "some of the statements of the United States Attorney in his summation are subject to criticism" (Opinion p. 15). Nevertheless, the Court held that such statements did not affect the result and were not sufficiently damaging to come within the rule laid down by this Court in *Berger* v. *United States*, 295 U. S. 78.

III.

The petitioner Weiss, who had been a member of the Bar of the State of New York, took the stand and was cross-examined by the prosecutor. Under the guise of cross-examination the prosecutor was permitted to repeatedly read into his questions purported excerpts from documents not in evidence, to assume prejudicial statements of facts not borne out by the record and to suggest that statements had been made to him out of court in respect to which no proof was offered.

The prosecutor cross-examined the petitioner Weiss concerning a law suit instituted by one Gorowitz former client of the petitioner, through an attorney Males against Gorowitz's previous attorney one Lehr to compel the return of $5,000. In his cross-examination, the prosecutor read from affidavits in that proceeding which were made by Lehr, Gorowitz and one Blumenstein (R. 1895, 1985-6). These affidavits contained charges and counter charges of bribery, corruption, blackmail and extortion made by Gorowitz, Lehr and Blumenstein concerning one another.

To impeach the petitioner Weiss, the cross-examiner called his attention to one Max Blumberg (R. 1899, 1907) and when the defendant denied that he had induced clients to sell their insurance to companies by telling them they could arrange to get new insurance the prosecutor, despite the denial, then stated that Blumberg had told him in his office the con-

trary (R. 1906-7). There is no evidence in the record as to what Blumberg actually said.

Despite the petitioner's denial that he had represented to one Steuer that he was in a position to guarantee the payment of a claim that could not succeed in court (R. 1885-6), the prosecutor was nevertheless permitted to constantly repeat his questions.

During the course of his cross-examination of the petitioner Weiss, the prosecutor implied that many of the petitioner's friends were in trouble (R. 1974), and in reply to an answer of the petitioner Weiss stated that he had seen those that were indicted.

In cross-examining the petitioner concerning an alleged talk with a lawyer (R. 1966), the prosecutor incorporated in his questions quotations from a document (Ex. 385 for Id.) which was not in evidence, a document which purported to be a wire recording of the conversation. The prosecutor, despite the petitioner's denials that he was concerned in or suggested a bribery, was permitted to suggest and imply that the defendant had (R. 1966-9).

The petitioner Gross respectfully submits that his cross-examination on collateral matters was likewise highly improper and prejudicial.

With respect to this cross-examination, the Court below stated that in so far as the proper bounds "may have been occasionally exceeded", any error was "sufficiently cured by the admonitions of the court" (Opinion p. 13).

IV.

The petitioner Weiss called as character witnesses one Leonard Gardner, one time associate counsel for the Metropolitan Life Insurance Company (R. 1764-8), Emanuel W. Levine, former chairman of the Grievance Committee of the

Nassau County Bar Association, and others. They testified to his good reputation for integrity, fair and honest dealing.

Upon cross-examination, Gardner over objection and exception, which was coupled with a motion for a mistrial, which was denied, the United States Attorney was permitted, despite the witness' statement that he had not heard that an application had been made by the petitioner for life insurance (R. 1765), to ask:

> "If you heard that J. J. Weiss made an application for insurance, and that it was investigated by the Hooper-Holmes Agency* and that the report showed, in substance, that J. J. Weiss was considered to be a shyster and the ambulance-chasing type of attorney, shrewd and tricky in his dealings, and will bear watching in any dealings with him—I ask you if that would change or alter your opinion as expressed in your testimony a few moments ago as to his character?
>
> A. Not if I had just heard it. I do not go on what I hear. I would want to know who made that report." (R. 1765-6).

The record is bare of any proof that an investigation had been made as the prosecutor stated or that a report had been made as the United States Attorney stated in his question.

The petitioner Gross respectfully submits that his character witnesses were likewise improperly cross-examined.

V.

The evidence showed that the defendant Messman, who testified for the Government, had been paid a weekly salary by the Government, first in the amount of $65 per week and

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* An investigating service for insurance companies (R. 1765).

later in the amount of $100, totalling $3,227.12 from the date of his arrest to the date of trial (R. 814). The defendant Nelson, who also testified for the Government, similarly was paid a weekly salary of $50 by the Government, totalling $1,755. from the date of his arrest until the date of trial (R. 365-6). The defendant Spitz, who also testified for the Government, received after his arrest $1,700. from one of the insurance companies as consideration for the cancellation of his policy which at the time had a cash surrender value of only $878.40 (Ex. 261). The defendant Berger, who also testified for the Government, received $50 per week from an unidentified source (R. 1570).

The petitioner Weiss requested the trial court to charge that the fees to be paid witnesses are paid by government statute and requested the Court to charge in the language of the statute, U. S. C. Title 28, Section 601, Judicial Code and Judiciary. This request was refused by the trial court, which refusal has been assigned as error (R. 2653).

VI.

The District Court, the petitioner Gross respectfully submits, erroneously denied his application for the return of certain papers and documents illegally seized and for the suppression of such evidence. The denial of his application seriously prejudiced his rights at the trial.

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on April 13, 1939. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, U. S. C. Title 28, Section 347.

Questions Presented.

I.

Was it error to admit, over petitioners' objection and exception, evidence of intrastate telephone communications intercepted, in violation of the Penal Law of the State of New York, by persons acting under the direction of agents of the United States, by tapping telephone wires which were conduits of both intrastate and interstate communication?

(a) Is such evidence rendered inadmissible by Section 605 of the Federal Communications Act? (Ch. 652, 48 Stat. 1064, 1103; U. S. C. Title 47, Section 605.)

(b) Apart from the Federal Communications Act, is such evidence rendered inadmissible by the Fourth and Fifth Amendments to the Constitution of the United States?

(c) Apart from the Federal Communications Act and the Fourth and Fifth Amendments, is such evidence rendered inadmissible by the fact that it was obtained by the criminal act of agents of the United States in violation of state law?

II.

Was it error to admit over petitioners' objection and exception, evidence of a telephone conversation intercepted, in violation of the Penal Law of the State of New York, by persons acting under the direction of agents of the United States, by tapping telephone wires which were conduits of intrastate and interstate communication, without proof as to whether the said conversation was an intrastate or interstate communication?

III.

Was the summation of the United States Attorney so improper and prejudicial as to constitute a denial of the petitioners' right to a fair trial, within the rule laid down in this Court in *Berger* v. *United States*, 295 U. S. 78?

IV.

Did the Court in permitting the prosecutor to read to the jury, in the form of questions, purported excerpts from documents not in evidence, to assume prejudicial statements of fact not borne out by the record and to suggest that statements prejudicial to the petitioners had been made to the prosecutor out of court, in respect to which no proof was offered, deny to petitioners Weiss and Gross their fundamental right of confrontation and cross-examination?

V.

Was it error and a deprivation of the petitioners' right to a fair trial and his fundamental rights of confrontation and cross-examination to have permitted the prosecutor to cross-examine character witnesses concerning a highly prejudicial report alleged but not proven to have been made, which the witnesses heard for the first time in questions put to them on cross-examination?

VI.

Was it error for the Court to refuse to charge, as requested, with respect to the fees which may be paid a witness by the Government pursuant to the applicable Federal statute?

VII.

Did the District Court err in denying the application of the petitioner Gross for the return of certain papers and

documents illegally seized and for the suppression of such evidence?

Statutes Involved.

Section 605 of the Federal Communications Act (Ch. 652, 48 Stat. 1064, 1103; U. S. C. Title 47, Section 605) provides as follows:

> "§605. *Unauthorized publication or use of communications.*
>
> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having be-

come acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, §605, 48 Stat. 1103.)"

Reasons for Allowance of Writ.

1. The decision of the Court below, holding admissible evidence of intercepted intrastate telephone conversations, is in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

Such evidence has been held inadmissible by the Circuit Court of Appeals for the Third Circuit in *Sablowsky* v. *United States*, 101 F. (2d) 183, (1938), and by the Circuit Court of Appeals for the Sixth Circuit in *Diamond* v. *United States*, 94 F. (2d) 1012.[1]

Such evidence was held admissible by the Circuit Court of Appeals for the First Circuit, by a divided Court, in *Valli* v. *United States*, 94 F. (2d) 687.[2]

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1. See also the *per curiam* opinion in *Diamond* v. *United States*, *supra*, denying the Government's petition for a rehearing. This opinion filed on April 11, 1938 and not officially reported, is appended to the brief in support of this petition.

2. In *Valli* v. *United States*, 94 F. (2d) 687, this Court granted a writ of certiorari (58 Sup. Ct. 760). Thereafter, further proceedings were abandoned by the petitioner and the cause was never brought on for argument in this Court.

The Court below stated in its opinion that in view of these conflicting decisions, it reached its conclusions with "some hesitation" (Opinion p. 6).

2. The decision of the Court below, holding such evidence admissible, is a decision upon an important question of Federal law which has not been, but should be, settled by this Court.

3. The decision of the Court below, holding admissible evidence of an intercepted telephone conversation without proof as to whether such conversation was intrastate or interstate, is a decision upon a Federal question in a way probably in conflict with the applicable decisions of this Court (*Nardone* v. *United States*, 302 U. S. 379, 1937).

4. The decision of the Court below, holding that the summation was not prejudicial, is a decision upon a Federal question in a way probably in conflict with the applicable decisions of this Court (*Berger* v. *United States*, 295 U. S. 78).

5. The decision of the Court below, in holding that the summation was not prejudicial error, so far sanctions a departure by the lower Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

6. The decision of the Court below holding that the cross-examination of petitioners Weiss and Gross was not prejudicial error is a decision upon a Federal question in a way probably in conflict with the applicable decisions of this Court (*Berger* v. *United States*, 295 U. S. 78).

7. The decision of the Court below holding that the cross-examination of the petitioner Weiss was not prejudicial so far sanctions a departure by the lower Court from the accepted

and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

8. The decision of the Court below in upholding the refusal of the trial court to charge with respect to the fees paid by the Government to witnesses so far sanctions a departure by the lower Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioners pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioners be granted such other and further relief as may seem proper.

Dated, New York, N. Y., May 5, 1939.

JOSEPH J. WEISS,
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM—1938

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP and DR. MAXIMILIAN GOLDSTEIN,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit has not yet been officially reported. It is annexed to the certified transcript of the record heretofore filed herein.

No opinion was rendered by the United States District Court for the Southern District of New York.

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on April 13th, 1939. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended, U. S. C. Title 28, Section 347.

Statement of the Case.

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

Specification of Assigned Errors To Be Urged.

It is intended to urge all the errors assigned (R. 2626-2691), including the following:

1. It was error to admit, over petitioners' objection and exception, evidence of intrastate telephone communications intercepted, in violation of the Penal Law of the State of New York, by persons acting under the direction of agents of the United States, by tapping telephone wires which were conduits of both intrastate and interstate communication.

2. It was error to admit, over petitioners' objection and exception, evidence of a telephone conversation intercepted, in violation of the Penal Law of the State of New York, by persons acting under the direction of agents of the United States, by tapping telephone wires which were conduits of intrastate and interstate communication, without proof as to whether the said conversation was an intrastate or interstate communication.

3. It was error to permit the United States Attorney to make an improper and prejudicial summation.

4. It was error to permit the prosecutor to read to the jury, in the form of questions, purported excerpts from documents not in evidence, to assume prejudicial statements of fact not borne out by the record and to suggest that statements prejudicial to the petitioners had been made to the prosecutor out of Court, in respect to which no proof was offered.

5. It was error to permit the prosecutor to cross-examine character witnesses concerning highly prejudicial documents alleged but not proven to exist.

6. It was error for the Court to refuse to charge as requested with respect to the fees which may be paid a witness by the Government, pursuant to the applicable Federal statute.

7. It was error to deny the application of petitioner Gross for the return of certain papers and documents illegally seized and for the suppression of such evidence.

Argument.

I.

It was error to admit, over petitioners' objection and exception, evidence of intrastate telephone communications intercepted, in violation of the Penal Law of the State of New York, by persons acting under the direction of agents of the United States, by tapping telephone wires which were conduits of both intrastate and interstate communication.

A.

Such evidence was rendered inadmissible by Section 605 of the Federal Communications Act (Ch. 652, 48 Stat. 1064, 1103; U. S. C. Title 47, Section 605).

The decision of the Court below upon this point is squarely in conflict with the decisions of the Circuit Courts of Appeals for the Third and Sixth Circuits upon the same question.

Sablowsky v. *United States*, 101 F. (2d) 183 (C. C. A. 3rd, 1938)

Diamond v. *United States*, 94 F. (2d) 1012 (C. C. A. 6th, 1938). See also opinion on reargument annexed to this brief.

This Court has once attempted to resolve that conflict by granting certiorari in *Valli* v. *United States* (58 Sup. Ct. 760), but since the *Valli* case was never brought on for argument, the question has never been passed upon by this Court. The case at bar presents an opportunity for this Court to decide the question once and for all.

Section 605 (quoted in full in the petition) provides in part:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *"

In *Nardone* v. *United States*, 302 U. S. 379 (1937) this Court held that by virtue of this statute, evidence of telephone communications procured by Federal officers by "tapping" telephone wires was inadmissible in a criminal trial in a Federal court. The Court construed Section 605 and held that the words "no person" applied to Federal officers and that the word "divulge" applied to testimony in Court.

The particular communications involved in the *Nardone* case were interstate communications, although no point of that fact was made by the Court. The question which was stated for decision and answered in the negative by the Court was "broad enough to include the question now presented". *United States* v. *Plisco*, 22 Fed. Supp. 242, 243; *Diamond* v. *United States*, 94 Fed. (2d) 1012; *Sablowsky* v. *United States*, 101 Fed. (2d) 183.

In the case at bar the Circuit Court of Appeals has held that the rule of the *Nardone* case is inapplicable on the ground that the communications here involved (with one possible exception) were intrastate. In reaching this conclusion, the Court below decided that Section 605 applies only to interstate communications. It based its construction of the statute upon two principal grounds: (a) that the language of Section 605 itself shows that only interstate communications are within the scope of the statute; and (b) that other sections of the Federal Communications Act, notably Sections 1 and 2 thereof, show that the Act applies only to interstate communications. Petitioners respectfully submit that both grounds are untenable and that the construction placed upon the statute by the Court below is erroneous.

(a) With respect to the language of Section 605 itself, it will be noted that that Section contains four principal clauses. The first clause relates to the divulging of telephone communications by persons who receive or transmit them. The third clause relates to the use of the information contained in telephone communications to be made by persons who receive the same. These two clauses are obviously to be read together. In each of these clauses the telephone communications referred to are distinctly limited to "interstate or foreign communications".

The case at bar, however, does not involve any divulging or use of telephone communications by persons who received or transmitted them. We are here concerned rather with *interception* of such messages. This subject is governed by the second and fourth clauses of Section 605. The second clause, quoted above, prohibits the interception and divulging of communications. The fourth clause, which is to be read with the second, deals with the use to be made of "such intercepted communication" by persons who have become acquainted with their contents.

The second and fourth clauses, which are the portions of the statute applicable here, are not limited to "interstate or foreign communications" but specifically apply to "any communication".

This difference in the language of the various clauses of Section 605 is of vital significance upon the problem here presented. It shows that with respect to *intercepted* messages Congress intended that the prohibition of the statute should apply to all communications regardless of their interstate or intrastate character. It shows that when the Court below held that Section 605 applied only to interstate communications, it was erroneously basing its construction upon those clauses of Section 605 which do not apply to intercepted messages, and was ignoring the language of the portions of the Section which are in point here.

(b) With regard to other sections of the Communications Act, apart from Section 605, the Court below placed emphasis upon Section 1 (47 U. S. C. Section 151) which states that the Federal Communications Commission is created "for the purpose of regulating interstate and foreign commerce in communication by wire and radio". The Court below also mentioned Section 2 of the Act (47 U. S. C. Section 152) which states that "the provisions of this chapter shall apply to all interstate and foreign communication by wire or radio".

It is apparent that neither of these preliminary provisions of the statute has any bearing upon the construction of Section 605. If it can be said that the purpose of the statute, as a whole, was to secure privacy for interstate and foreign communications, it must follow that the regulation and protection of such communications cannot be effected unless the statute prohibits the interception of intrastate communications, for, as the Circuit Court of Appeals in the *Diamond* case, *supra*, said:

"If a federal agent is permitted to listen in on a telephone conversation he of course hears all that is said regardless of its nature. He is given an opportunity to hear and disclose that which he is forbidden to hear and disclose and to that extent the privacy which the Communications Act manifestly intends to secure for both interstate and foreign communications by telephone is destroyed."

Section 605, moreover, is not one of the regulatory provisions governed by sections 1 and 2 of the Act. It is included toward the end of the Act under Title VI thereof headed "Miscellaneous Provisions". It must be construed by itself, independent of the earlier provisions of the statute which deal with an entirely different subject.

Sablowsky v. *United States*, 101 F. (2d) 183 (C. C. A. 3rd, 1938);
Diamond v. *United States*, 94 F. (2d) 1012 (C. C. A. 6th, 1938). See also opinion on reargument annexed to this brief.

Petitioners respectfully urge that such a construction is not only required by the language of the Communications Act itself, but also that it is the only construction which is supported by common sense. There is no valid basis for a distinction based solely upon the fortuitous circumstance of the geographical location of the speaker at the time of the illegal interception of his conversation. The ethical considerations which support the policy of excluding intercepted messages apply with as much force to intrastate as to interstate communications. It is "not to be assumed that Congress intended diverse and hostile rules for like situations".

United States v. *Plisco*, 22 F. Supp. 242 (D. C. 1938).

It is submitted that this Court should resolve the conflict which has arisen among the decisions of the various circuit courts of appeals by adopting a construction of Section 605 which gives effect to its language and which leads to a reasonable result.

B.

Apart from the Federal Communications Act, such evidence was rendered inadmissible by the Fourth and Fifth Amendments to the Constitution of the United States.

In *Olmstead* v. *United States*, 277 U. S. 438 (1927), it was held by a closely divided Court, that the interception of telephone messages by "wiretapping" was not an illegal search and seizure, within the meaning of the Fourth Amendment, and that a defendant against whom evidence had been obtained by such means was not compelled to be a witness against himself within the meaning of the Fifth Amendment. The construction placed by the majority of the Court upon the Fourth Amendment limited the application of that Amendment to searches and seizures of physical objects and hence excluded the case of the overhearing of oral conversations.

It is respectfully urged that such a narrow construction of the Fourth Amendment is not required by its terms and by the previous decisions of this Court and that this Court should take this occasion to reconsider the question of the applicability of the Fourth Amendment and should overrule its decision in the *Olmstead* case.

C.

Apart from the Federal Communications Act and the Fourth and Fifth Amendments, such evidence is rendered inadmissible by the fact that it was obtained by the criminal act of agents of the United States in violation of State law.

In *Olmstead* v. *United States, supra*, the Court recognized that evidence obtained by wiretapping in violation of State law was evidence procured by the criminal act of agents of the United States. Nevertheless, the majority of the Court held that this fact did not justify carving out an exception to the general common law rule that evidence illegally obtained is nevertheless admissible. The dissenting justices rendered a vigorous protest against this decision. Mr. Justice Holmes, dissenting, stated:

> "But I think, as Mr. Justice Brandeis says, that apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act. * * * We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part. * * * If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed" (*Olmstead* v. *United States*, 277 U. S. 438 at pp. 469-70).

Since the decision in the *Olmstead* case, there has been a rising tide of public opinion against the practice of wiretapping under the supervision of Federal officers. Illustrative of this opinion is the statement by Honorable Herbert H.

Lehman, Governor of the State of New York (New York Times, June 18, 1938) with reference to wiretapping:

> "It has been the vehicle of great oppression and persecution. It has caused people to be afraid of discussing their most intimate personal problems. * * * I am particularly concerned with the danger of wiretapping. Today no one is safe from the menace of it."

This view was expressly recognized by this Court in the *Nardone* case, *supra*, in which the Court stated:

> "For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong" (*Nardone* v. *United States*, 302 U. S. 379, 384).

It has been suggested that the *Nardone* decision has overruled *Olmstead* v. *United States*, *supra*, on this point. See dissenting opinion of Judge Morton in *Valli* v. *United States*, 94 F. (2d) 687.

Petitioners urge that the views set forth by Judge Morton and by the dissenting justices in *Olmstead* v. *United States* should be adopted by this Court and that the *Olmstead* case should be definitely overruled. Wholly apart from the effect of the Federal Communications Act and the effect of the Fourth and Fifth Amendments, it lies within the power of this Court to lay down common law rules of evidence for the conduct of criminal trials in the Federal courts. As Mr. Justice Holmes said in the *Olmstead* case:

> "There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules" (*Olmstead* v. *United States*, 277 U. S. 438, 470).

This Court should give effect to the point of view which it recognized in the *Nardone* case and should declare, once and for all, that the crime of Federal officers should not be tacitly condoned by the Federal Courts and that evidence obtained as the fruits of such crime should not be admissible in a criminal trial.

II.

The improper cross-examination of the petitioners Weiss and Gross and of their character witnesses and the summation of the United States Attorney deprived petitioners of a fair trial.

The repeated reading into questions put on the cross-examination of the petitioner Weiss and of his character witnesses of purported excerpts of documents not in evidence and assuming prejudicial statements of fact not borne out by the record and in suggesting that statements had been made to the prosecutor out of court, in respect of which no proof was offered, deprived the petitioners of their right to a fair trial.

Berger v. *United States*, 295 U. S. 78, 84;
People v. *Wells*, 100 Cal. 459, cited with approval in *Berger* case at p. 89;
Johnson v. *United States*, 215 Fed. 679, 686 (C. C. A. 7th, 1914);
People v. *Malkin*, 250 N. Y. 185, 197, likewise quoted with approval in *Berger* case;
People v. *Wolf*, 183 N. Y. 464, 472, 473;
People v. *Marendi*, 213 N. Y. 600, 618;
Pittman v. *U. S.*, 42 Fed. (2d) 793.

The summation of the United States Attorney was highly improper and constituted reversible error.

The United States Attorney told the jury that he had, prior to the indictment, formed a conviction of the petitioners'

guilt; that he was more convinced by what he learned during the preparation of the case, and that he had not the slightest doubt in his mind of petitioners' guilt (2573-4). He also stated that many of the exhibits which the jurors had seen and heard were "only a fraction" of the proof (2573). His remarks were permeated with his personal views, with allusions to the painful duty which he was performing, with comments about facts outside the record, with assertions of private knowledge of matters which had not been brought before the jury, with assurances that the Government in reality had much additional evidence which it had not bothered to produce. His summation did not purport to cover the facts of the case for he pointed out (2571) that the facts had already been covered by his assistants. The petitioners were denied their right to a fair trial by the summation of the United States Attorney.

Berger v. *United States, supra;*
Taliaferro v. *United States,* 47 Fed. (2d) 699, at p. 701;
Minker v. *United States,* 85 Fed. (2d) 425;
Commonwealth v. *Shoemaker,* 240 Pa. 255.

He appealed to the jurors' personal financial benefits and pointed to the sufferings of thousands of policyholders which would result from a verdict of acquittal. This was manifestly improper.

Beck v. *United States,* 33 Fed. (2d) 107 (C. C. A. 8th, 1929);
Read v. *United States,* 42 Fed. (2d) 636 (C. C. A. 8th, 1930);
Turk v. *United States,* 20 Fed. (2d) 129 (C. C. A. 8th, 1927);
Robinson v. *United States,* 32 Fed. (2d) 505 (C. C. A. 8th, 1928).

E.

CONCLUSION.

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

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Diamond v. United States, (C. C. A. 6th Cir.)

Per curiam opinion upon rehearing filed April 11, 1938

"These cases are before us upon petition to rehear. The petition states 'of approximately 150 telephone interstate calls,* the rest all being intrastate calls,' and that the order made by which the cases were reversed is silent as to the effect of the Communications Act of 1934 upon intrastate calls. The declared purpose of the Communications Act was to regulate interstate and foreign commerce in communications by wire or radio. Section 605 thereof contains the provision,—

'And no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person.'

"With reference to this provision the Supreme Court in *Nardone* v. *United States*, December 20, 1937 said:

'Taken at its face value the phrase "no person" comprehends federal agents, and a ban on communication to "any person" bars testimony to the content of an intercepted message.'

* Obviously a misprint. The petition of the United States Attorney reads (p. 3), "of approximately 150 telephone conversations introduced into evidence only four or five were interstate calls, the rest being intrastate calls."

"It further said:

'We nevertheless face the fact that the plain words of Section 605 forbids anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that "no person" shall divulge or publish the message or its substance to *"any person"*. To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments.'

"It seems to us that the privacy to be achieved by the mandate of the statute is the privacy of a conduit or instrumentality of interstate communication, though the same physical equipment may likewise be the means by which intrastate communications are made. The broad scope and constitutional validity of statutes have been sustained where instrumentalities serve both interstate and foreign commerce, even when applied in specific instances to transactions which are not interstate commerce. So the Federal Safety Appliance Act as an exercise of Federal power under the commerce clause has been held to extend to all vehicles used upon a highway of interstate commerce whether the vehicles themselves are so engaged or not, for the safety to be secured by the Act is the safety of the persons transported in interstate commerce, no matter what may be the source of the dangers which threaten it. *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 25, 26; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 41.

"It seems clear enough that the statute prohibits the interception by 'wire tapping' of all telephone communications and the subsequent disclosure thereof by all persons except those authorized by the sender. *Neither federal agents nor intrastate communications are excluded.* If a federal agent is permitted to listen in on a telephone conversation he of course hears all that is said regardless of whether the communication is interstate or intrastate in its nature. He is given an opportunity to hear and disclose that which he is forbidden to hear and disclose and to that extent the privacy which the Communications Act manifestly intends to secure for both interstate and foreign communications by telephone is destroyed.

The petition to rehear is denied." (Italics ours.)